No. 91-1600

In the Supreme Court of the United States

OCTOBER TERM, 1992

HAZEN PAPER COMPANY, ET AL., PETITIONERS

v.

WALTER F. BIGGINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

KENNETH W. STARR
Solicitor General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
JENNIFER S. GOLDSTEIN
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTIONS PRESENTED

1. Whether the definition of "willfulness" approved by this Court in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), for the imposition of liquidated damages under the Age Discrimination in Employment Act may properly be applied in cases of individual discriminatory treatment.

2. Whether evidence that an employer interfered with the vesting of an employee's pension rights, under a plan where benefits vest after ten years of service and are not based directly on age, may be used to support a verdict of age discrimination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1600

HAZEN PAPER COMPANY, ET AL., PETITIONERS

v.

WALTER F. BIGGINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the standard for awarding liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and the question whether evidence of interference with pension rights may support a jury finding of age discrimination under the ADEA. The Equal Employment Opportunity Commission has primary responsibility for the administration, interpretation and enforcement of the ADEA. The Department of Justice has a significant interest in the in-

terpretation and enforcement of a wide range of federal civil rights statutes, including the ADEA. The resolution of the issues presented in this case will directly affect the government's discharge of its responsibilities.

STATEMENT

Petitioner Hazen Paper Company is a manufacturer of paper products with decorative coatings for use in products such as cosmetic wrap, lottery tickets, and pressure sensitive labels. C.A. App. 291-292. In 1977, Hazen Paper hired respondent, who was then 52 years old, to serve as its Technical Director. *Id.* at 289-290, 417. In 1983, based on his perceived contributions to Hazen Paper's success, respondent began requesting pay raises. *Id.* at 345-348. Respondent and petitioners continued to discuss compensation issues over the next three years.

In May 1986, petitioners Thomas and Robert Hazen asked respondent to sign a confidentiality agreement, expressing their concern that respondent—through two companies he set up with his son—was providing to competitors some of the services he performed for Hazen Paper. C.A. App. 358-361. Respondent countered that the Hazens had approved his limited involvement in his son's companies (*id.* at 362-363), that his son did most of the work, and that he earned no money from either venture. *Id.* at 370. Nonetheless, respondent told the Hazens he would sign a confidentiality agreement if it was accompanied by a satisfactory agreement on compensation. *Id.* at 374.

About a week later, respondent was presented with a draft agreement under which he would have agreed to assign the rights to all inventions made within the scope of his employment to Hazen Paper, maintain the confidentiality of the company's trade secrets, and not engage directly or indirectly in any competitive business. C.A. App. 1138-1142. The agreement did not address respondent's compensation, and did not provide for severance pay if respondent's employment was terminated. Although told that he would be fired unless he did so, respondent, then 62, refused to sign the agreement. *Id.* at 371, 375, 378. He also declined petitioners' offer to enter into a consulting arrangement, under which he would not have employee status or benefits. *Id.* at 970-971. Respondent was fired on June 13, 1986. *Id.* at 377-378. At the time, he had been employed by petitioners for over nine years; his rights under the Hazen Paper pension plan would have vested on the tenth anniversary of his employment.

In September 1986, Hazen Paper hired Timothy McDonald, who was about 35 years old, to replace respondent as Technical Director. C.A. App. 779-780. McDonald was required to sign a confidentiality agreement, which contained a six-month non-competition clause and provided for 100 days of separation pay. *Id.* at 1501-1508. None of Hazen Paper's other employees was asked to sign a confidentiality agreement. *Id.* at 373-374.

Respondent sued petitioners in federal district court alleging age discrimination in violation of the ADEA and interference with the vesting of his pension in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Respondent's suit also included various state law claims relating primarily to disputes over his compensation.

At trial, in addition to evidence of the events set out above, respondent testified that the Hazens twice made comments about his age. He testified that Thomas Hazen told him that his life insurance policy cost more because he was "so old," and that Robert Hazen joked that respondent and another employee would not need a company handball court membership because they were "so old." C.A. App. 402. Thomas Hazen, who made the decision to fire respondent, testified that he was "absolutely" aware that age discrimination was illegal. *Id.* at 966-967.

The district court instructed the jury that in order to prevail on his age discrimination claim, respondent had to "prove by a preponderance of the evidence that but for his age, he would not have been fired." C.A. App. 1086. The charge on the ADEA claim did not mention respond-

ent's pension status. The jury was instructed that if it found for the plaintiff on the age discrimination claim, it must further determine whether the violation was "willful," *id.* at 1088, and that to find willfulness it must find that petitioners "knew of or showed reckless disregard for the law prohibiting age discrimination * * * [and,] with bad purpose, intentionally disobeyed or ignored the law." *Id.* at 1088-1089. Petitioners did not object to any of the court's instructions on the ADEA claim. *Id.* at 1115.

The jury found that petitioners willfully violated the ADEA when they fired respondent, and awarded respondent $560,775 in back pay. C.A. App. 41. The court subsequently awarded respondent an equal amount of liquidated damages based on the finding of willfulness. *Id.* at 46-47; 29 U.S.C. 626(b). The jury also accepted respondent's ERISA claim that petitioners fired him in order to interfere with the vesting of his pension rights (see 29 U.S.C. 1140), and agreed with respondent on most of his state law claims. C.A. App. 42-45.

Petitioners moved for judgment notwithstanding the verdict on the ADEA claim, arguing that there was insufficient evidence to support a finding that respondent was fired because of his age, and that even if there was an ADEA violation it was not willful because there was no direct evidence of egregious misconduct. C.A. App. 54-63. The district court granted the motion only in part, holding that the evidence, although sufficient to support a finding of age discrimination, was "a bit thin" and too "sparse [and] circumstantial" to support a finding of willfulness. Pet. App. A56-A62.

Both parties appealed. The court of appeals affirmed the district court's ruling that the evidence was sufficient to uphold the jury's finding that respondent was fired because of his age. Pet. App. A14. The court reviewed several pieces of evidence "bearing directly on the ADEA claim": the critical comments the Hazens made about respondent's age (*id.* at A12-A13); the difference between the confidentiality agreement offered to respondent and the agreement offered to his younger successor (*id.* at A13); the fact that if respondent had worked for "a few more weeks," he would have completed ten years of service and his pension rights would have vested (*ibid.*); and the fact that under the consulting offer made to respondent as an alternative to his signing the confidentiality agreement without a pay increase, respondent would have lost his employee benefits (*id.* at A13-A14). The court concluded that based upon this evidence, "the jury could reasonably have found that Thomas Hazen decided to fire [respondent] before his pension rights vested and used the confidentiality agreement as a means to that end," and that the "jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years." *Id.* at A14. The court held that the jury could reasonably have found that age was a determining factor in the decision to terminate respondent's employment. *Ibid.*

The court of appeals reversed the district court's holding that the evidence did not support the jury's finding of willfulness. Pet. App. A21. After surveying the various standards other courts of appeals have used to determine willfulness, the court decided to "adopt, without modification or qualification," the test for willfulness set out by this Court in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 128 (1985): "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" Pet. App. A20 (quoting *Thurston*). The court reinstated the finding that the violation was willful because (i) the jury was instructed that age had to be the determining factor in the decision to fire respondent in order to find the underlying ADEA violation, (ii) there

was evidence that Hazen Paper was aware of the illegality of age discrimination, and (iii) the ADEA finding itself rested on a "solid evidentiary foundation." *Id.* at A21.

SUMMARY OF ARGUMENT

I. The ADEA provides for recovery of lost wages in cases of age discrimination, and for double damages in cases of "willful" violation of the statute. The court of appeals applied a definition of "willfulness" that this Court has twice approved for use under the ADEA. That standard, announced in *Trans World Airlines, Inc.* v. *Thurston*, *supra*, requires that an employer have violated the law either knowingly or recklessly, and comports with both conventional legal usage and Congressional intent.

Although this Court has made clear that Congress intended the "willfulness" standard to define a meaningful "two-tier" scheme of liability under the ADEA, there is no reason to expect that "ordinary" and "willful" cases will occur in equal proportions in different types of ADEA cases, including individual discrimination cases. Individual cases are by their nature more likely to be ones in which an employer has intentionally discriminated against a particular employee, knowing (or not caring) that such discrimination is illegal. Even in individual cases, however, there are various ways in which an employer's actions could be intentional without being "willful" under the *Thurston* standard. That standard therefore maintains Congress's "two-tier" liability structure both overall and in such cases, without the need for any modification.

Some courts of appeals, erroneously reading *Thurston* to require that "willfulness" be found in a smaller proportion of individual discrimination cases than application of the *Thurston* standard itself would produce, have required individual plaintiffs to produce greater or more persuasive evidence of an underlying ADEA violation in order to sustain a second-order finding that the defendant's conduct was "willful." Besides being unnecessary

under a proper interpretation of *Thurston*, these enhanced burdens depart illogically and without justification from the statutory standard selected by Congress for imposition of double damages.

II. Petitioners present the question whether evidence that they interfered with the vesting of respondent's pension could be used to support the verdict that they discriminated against respondent because of his age. We doubt whether this case presents the issue in the context most appropriate for consideration by this Court. Assuming that the Court reaches the question, however, we agree that in considering the sufficiency of the evidence supporting the verdict on respondent's ADEA claim, the court of appeals should not have relied on pension evidence that, in the particular context of this case, had very little relevance to the question of age discrimination.

Although we doubt that the court of appeals viewed the pension evidence as determinative, and the jury's verdict can be sustained without reference to that evidence, this Court may nonetheless wish to remand to the court of appeals to permit it to assess the sufficiency of the remaining evidence in the first instance. In any event, because discrimination cases present a particularly wide variety of facts and circumstances, we think it would be unwise to mandate any per se rule governing the consideration of evidence like that presented in this case. The weight to be accorded such evidence in other cases should ultimately be left to the sound discretion of courts confronted with specific cases in which the relevant issues actually arise.

ARGUMENT

I. DISCRIMINATION AGAINST AN INDIVIDUAL IN VIOLATION OF THE ADEA IS "WILLFUL" IF THE EMPLOYER ACTED KNOWINGLY OR WITH RECKLESS DISREGARD FOR THE LAW

A. Application of the *Thurston* Definition of "Willfulness" in Individual Discrimination Cases Comports With the Plain Language of the ADEA

Section 7(b) of the ADEA, 29 U.S.C. 626(b), generally incorporates the enforcement scheme of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* In particular, Section 7(b) states that amounts owing to an individual because of a violation of the ADEA shall generally be treated as unpaid minimum wages for purposes of Section 16 of the FLSA, 29 U.S.C. 216. Section 16 provides that an employer that violates the FLSA shall be liable to injured employees "in the amount of their unpaid minimum wages, * * * and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). As to the ADEA, however, Congress provided that the double ("liquidated") damages imposed under the FLSA would be available only in cases of "willful" violations of the law. ADEA § 7(b), 29 U.S.C. 626(b).[1]

This Court considered the ADEA's use of the term "willful" in *Trans World Airlines, Inc.* v. *Thurston*, *supra*. The *Thurston* Court accepted the court of appeals' formulation of the willfulness standard—"a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA' "—although it disagreed with the lower court's application of that standard to the facts of the case. 469 U.S. at 126, 128-130 (quoting *Air Line Pilots Ass'n, Int'l* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). The Court rejected any requirement that an employer have acted with "evil motive or bad purpose" or specific intent to violate the law, *id.* at 126 n.19, as well as the opposite contention that any violation should be "willful" if the employer "simply knew of the potential applicability of the ADEA," *id.* at 127.

In *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988), the Court reaffirmed the *Thurston* definition of "willfulness" and applied it in the closely related context of the three-year statute of limitations that applies to "willful" violations of both the ADEA and the FLSA. 29 U.S.C. 255(a), 626(e)(1). Noting that *Thurston's* definition comported with both everyday language and common legal usage, the Court concluded that "[t]he standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act." 486 U.S. at 133.

As this Court recognized in both *Thurston* and *Richland Shoe*, the primary import of the term "willful" in conventional legal usage has been to set a high standard for imposition of legal sanctions, excluding actions that are reasonable or even negligent but taken in good faith. *Thurston*, 469 U.S. at 128-129 & n.22; *Richland Shoe*, 486 U.S. at 133, 135 & n.13. As the *Thurston* Court pointed out, for example, 469 U.S. at 125-126, the ADEA's "willfulness" limitation on double damages grew out of the same limitation on criminal liability under the FLSA, which had been interpreted to preclude liability unless the employer proceeded "without making any reasonable effort to determine whether the plan he [was] following would constitute a violation of the law." *Id.* at 126

[1] Under Section 11 of the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 89, as amended, 29 U.S.C. 260, a court may in its discretion reduce or deny liquidated damages otherwise payable under the FLSA where an employer shows that the act or omission giving rise to liability was taken in "good faith" and with "reasonable grounds" for believing that it did not violate the law. Congress did not incorporate this provision into the ADEA, but this Court has noted that the ADEA's "willfulness" proviso reflects "the same concerns." *Thurston*, 469 U.S. at 128 n.22.

(quoting *Nabob Oil Co.* v. *United States*, 190 F.2d 478, 479-480 (10th Cir.), cert. denied, 342 U.S. 876 (1951)).[2] The courts have applied similar definitions in a wide variety of contexts.[3]

In this case, a jury found that Walter Biggins had proved by a preponderance of the evidence that his employer had intentionally discriminated against him on the basis of his age: that "but for his age, he would not

[2] Congress may normally be presumed to have been aware of prior interpretations of a law that it incorporates into a new statute. *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (ADEA incorporates prior interpretation of FLSA right to jury trial); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 211 (1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 & n.66 (1982).

[3] See, *e.g.*, *Thurston*, 469 U.S. at 126-127; *United States* v. *Illinois Central R.R.*, 303 U.S. 239, 243 (1938) (Cruelty to Animals Act; violation "willful" if defendant "either intentionally disregards the statute or is plainly indifferent to its requirements") (quoting *St. Louis & S.F. Ry.* v. *United States*, 169 Fed. 69 (8th Cir. 1909)); *United States* v. *Murdock*, 290 U.S. 389, 394-396 (1933) (Revenue Acts of 1926 and 1928; act "willful" if "marked by careless disregard whether or not one has the right so to act," entitling defendant to instruction "with respect to his good faith and actual belief"); *Honey* v. *United States*, 963 F.2d 1083, 1087 (8th Cir. 1992) (Internal Revenue Code; violation "willful" if defendant " 'acts or fails to act * * * with knowledge or intent * * *' [or] by proceeding with a 'reckless disregard of a known or obvious risk' ") (quoting *Olsen* v. *United States*, 952 F.2d 236, 240 (8th Cir. 1991)); *Alabama Power Co.* v. *Federal Energy Regulatory Comm'n*, 584 F.2d 750, 753 (5th Cir. 1978) (Federal Power Act; willfulness requires "an intentional disregard of the reporting requirement or a plain indifference to it"); *Acro Mayflower Transit Co.* v. *ICC*, 535 F.2d 997, 999-1001 (7th Cir. 1976) (Interstate Commerce Act; "plain indifference"); *F.X. Messina Construction Corp.* v. *Occupational Safety & Health Review Comm'n*, 505 F.2d 701, 702 (1st Cir. 1974) (Occupational Safety and Health Act; violation "willful" where company acted with "indifference" to requirements of which it was "obviously aware"); *Darby* v. *United States*, 132 F.2d 928, 930 (5th Cir. 1943) (willfulness under FLSA Section 16(a) requires at least negligence as to legal requirements but not actual "evil motive").

have been fired." C.A. App. 1086 (jury instructions). The jury further found that the employer's actions were "willful," after being instructed that it should do so only if it believed that the employer "knew of or showed reckless disregard for, the law prohibiting age discrimination" and "intentionally disobeyed or ignored the law." C.A. App. 1088-1089. That definition of "willfulness" accords with *Thurston*, with the conventional legal use of the term, and with common sense. We therefore believe that this Court should approve the decision of the court below in this case and those of other courts of appeals that have properly applied the standard set out in *Thurston* to cases of individual discrimination.[4]

B. No Heightened Standard Is Necessary in Individual Discrimination Cases to Preserve the "Two-Tier" Liability Structure Established by Congress Under the ADEA

Petitioners do not appear to dispute *Thurston*'s analysis of the plain meaning of the statute's "willfulness" language. Instead, they argue (Pet. 8-14) in essence that when applied in an individual age discrimination case, the *Thurston* definition of willfulness conflicts with *Thurston*'s own analysis of Congress's intent in enacting the willfulness limitation. We do not believe that there is any such conflict.

As petitioners point out (Pet. 8-9), *Thurston* rejected the contention that an employer's action could be "willful" merely because the employer "knew of the potential applicability of the ADEA." 469 U.S. at 127-128. After determining that Congress intended liquidated damages under the ADEA to be "punitive in nature," *id.* at 125, the Court pointed out that because virtually all employers

[4] Pet. App. A20-A21; see also, *e.g.*, *Benjamin* v. *United Merchants & Mfrs., Inc.*, 873 F.2d 41, 43-44 (2d Cir. 1989); *Brown* v. *M & M/Mars*, 883 F.2d 505, 512 (7th Cir. 1989); *Cassino* v. *Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987); *Formby* v. *Farmers & Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

would be aware of the ADEA, the "potential applicability" standard "would result in an award of double damages in almost every case." *Id.* at 128. The Court held that such a standard would vitiate the "two-tiered" ordinary/punitive liability scheme intended by Congress. *Ibid.*

Petitioners argue that "in [individual] discriminatory treatment cases, a finding of predicate discrimination liability necessarily requires a finding of discriminatory intent," and that therefore a "mechanical" application of the *Thurston* definition of "willfulness" in such cases "will inexorably lead to double damages in *every* case, a result contrary to the clear Congressional intent explicated by the Supreme Court in *Thurston*." Pet. 10. Their position finds some support in a number of court of appeals opinions.[5] Both petitioners and those courts, however, fundamentally misconstrue *Thurston*'s admonition to preserve the distinction between ordinary and "willful" violations. *Thurston* nowhere holds that such a difference must be significant or even evident in any particular *category* of ADEA cases, such as individual discrimination cases. *Thurston*—and the statute—require only that the distinction be meaningful in the context of ADEA cases taken as a whole.[6]

---

[5] See *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544, 1551 (10th Cir. 1988) ("the practical result" of applying the *Thurston* standard would be to "permit[] a willful violation whenever liability is found in a disparate treatment case"); *Wheeler* v. *McKinley Enterprises*, 937 F.2d 1158, 1163-1164 (6th Cir. 1991) (quoting *Cooper*); *Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1100 (11th Cir. 1987) (*Thurston* standard "difficult to reconcile with the admonition to avoid imposing liquidated damages in every case, at least in the context of disparate treatment cases"); *Dreyer* v. *ARCO Chem. Co.*, 801 F.2d 651, 657 (3d Cir. 1986), cert. denied, 480 U.S. 906 (1987) ("[t]here is a danger that use of the 'knew or reckless disregard' standard for a discrete employment decision that has been made on the basis of age would in effect allow the recovery of liquidated damages any time there was a violation of the Act").

[6] The notion, implicit in petitioners' argument, of adopting different definitions of "willful" for different types of ADEA cases in order to achieve a particular mix of results is difficult to reconcile with the language of the statute.

Application of the *Thurston* standard to all ADEA cases, including individual discrimination cases, clearly achieves this purpose. For example, the ADEA provides several affirmative defenses and exceptions. See, *e.g.*, ADEA § 4(f), 29 U.S.C. 623(f); *Public Employees Retirement System* v. *Betts*, 492 U.S. 158 (1989) (actions taken pursuant to bona fide employee benefits plans); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985) (actions taken on the basis of reasonable factors other than age). In cases where an employer argues that such a provision is applicable, there is ample room for a court to find that an employer engaged in illegal disparate treatment, without doing so "willfully." In *Thurston* itself, this Court held that the employer could not justify a policy that discriminated on its face on the basis of age[7] under either the "bona fide occupational qualification" provision of 29 U.S.C. 623(f)(1) or the "bona fide seniority system" provision of 29 U.S.C. 623(f)(2), and thus upheld liability under the ADEA; the Court reversed the holding of willfulness, however, because the employer did not act in reckless disregard of the law.[8] 469 U.S. at 124-125, 129.

---

[7] It has been suggested that *Thurston* was a "disparate impact" case, and that its standard "is less useful in * * * disparate treatment cases[s] in which an individual employee alleges intentional discrimination aimed specifically at him." *Cooper*, 836 F.2d at 1549; see also *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d 152, 158 (6th Cir. 1988); *Lindsey*, 810 F.2d at 1099. As the Sixth Circuit later recognized, *Thurston* was not a disparate impact case. *Wheeler*, 937 F.2d at 1162 n.1 & 1164 n.3 ("[t]he policy that produced the adverse impact in *Thurston* was intentionally discriminatory * * * rather than neutral on its face"). See also *Burlew* v. *Eaton Corp.*, 869 F.2d 1063, 1065 n.4 (7th Cir. 1989). The distinction between *Thurston* and cases like the present one is instead the difference between individual employment decisions and decisions based on employment plans or policies of general application.

[8] The *Thurston* Court held that the employer "acted reasonably and in good faith in attempting to determine whether [its] plan

Even considering only individual discrimination cases, petitioners' concern (Pet. 8) that application of the *Thurston* standard will result in double damages "in literally *every* discriminatory treatment case" is overstated. The difference between negligent and reckless mistakes as to the legality of employment decisions leaves meaningful room for findings of unlawful but non-willful actions. See *Richland Shoe*, 486 U.S. at 135 n.13. See also, *e.g.*, *Price* v. *Marshall Erdman & Associates, Inc.*, Nos. 91-2303, 91-2373 & 91-3727 (7th Cir. July 8, 1992), slip op. 4-6 (Posner, J.) (supervisor's assertion that he believed the ADEA did not protect persons under 50, if true, would support finding of recklessness of large employer, but might show mere negligence on the part of small employer or supervisor himself); *EEOC* v. *Century Broadcasting Corp.*, 957 F.2d 1446, 1458 (7th Cir. 1992); *Burlew* v. *Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989); *Sycock* v. *Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156-157 (7th Cir. 1981) ("[a]ge discrimination resulting from unconscious stereotyping of an older person's abilities violates the ADEA although it may not have occurred with the state of mind necessary to a finding of willfulness").[9]

---

would violate the ADEA." 469 U.S. at 129. *Richland Shoe* makes clear that an employer that acted "unreasonably, but not recklessly, in determining its legal obligation" would also be protected from double damages. 486 U.S. at 135 n.13.

[9] In addition, employers may reasonably raise affirmative defenses in some individual discrimination cases. See *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 329 (D.C. Cir. 1991) (reversing summary judgment that an executive actually receiving more than $44,000 in annual pension benefits but possibly not entitled to that amount came within terms of ADEA § 12(c)(1), 29 U.S.C. 631(c)(1), permitting mandatory retirement for "bona fide executives" who are "entitled to an immediate nonforfeitable annual retirement benefit * * * [of] at least $44,000"); *Brown* v. *M & M/Mars*, 883 F.2d at 513 (possibility of bona fide occupational qualification defense preserves room for non-willful liability). See also *Blackmon* v. *Brookshire Grocery Co.*, 835 F.2d 1135, 1138 (5th Cir. 1988) (two year limitations

In application, the reckless disregard standard has not resulted in inevitable findings of willfulness in individual ADEA cases. See *Castleman* v. *Acme Boot Co.*, 959 F.2d 1417, 1423 (7th Cir. 1992); *Holzman* v. *Jaymar-Ruby, Inc.*, 916 F.2d 1298, 1304-1305 (7th Cir. 1990); *Overgard* v. *Cambridge Book Co.*, 858 F.2d 371, 376-378 (7th Cir. 1988). Similarly, since *Richland Shoe*, several courts applying the *Thurston* standard to determine the appropriate statute of limitations have found violations of the FLSA not to be willful. See *Lopez* v. *Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1515 (1st Cir. 1991); *Mireles* v. *Frio Foods, Inc.*, 899 F.2d 1407, 1416 (5th Cir. 1990) (where employer acted unreasonably but not recklessly, FLSA double damages appropriate but statute of limitations not extended); *Cook* v. *United States*, 855 F.2d 848, 850 (Fed. Cir. 1988).

It is of course true that in many cases such as the present one, where no defenses or exceptions are involved, employers found liable for individual acts of age discrimination will find it difficult to show that their actions were not "willful" under the *Thurston* standard. This is neither surprising nor inappropriate. This Court has characterized individual disparate treatment as "the most easily understood type of discrimination"; it occurs when an employer "simply treats some people less favorably than others because of" some protected characteristic. *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). Under the ADEA, that characteristic is age. It is to be expected that in any case that does not involve possible affirmative defenses or questions of coverage, a decision by an employer not to hire, to fire or not to promote an individual because

---

period applied to individual claims because employer's good faith belief in applicability of FLSA exemption for executive employees precluded finding of recklessness); *Murray* v. *Stuckey's, Inc.*, 939 F.2d 614, 622 (8th Cir. 1991) (where application of the FLSA executive exemption is at least arguable, "willfulness and good faith must be considered in the context" of the defense).

of his age would generally be viewed as "willful" under any plausible construction of the term. The fact that application of the *Thurston* test will result in a finding of willfulness in appropriate cases is not, however, an argument against the test, even if those cases are numerous or represent a high proportion of a particular category of ADEA litigation. As the court of appeals held (Pet. App. A20), in many individual discrimination cases, willfulness is simply "the nature of the beast."

C. The Heightened Standards of Evidentiary Review Suggested by Petitioners and Some Courts of Appeals for Findings of "Willfulness" Are Inconsistent With the Statute and With the Findings of Fact Required to Establish Predicate Liability for Discrimination

Some courts of appeals have adopted the position urged by petitioners, agreeing that the *Thurston* standard is inadequate because it would generally produce findings of "willfulness" in individual discrimination cases. Six circuit courts have devised essentially three different "enhancements" of the *Thurston* standard to avoid this perceived problem. Because their objective is fundamentally flawed, however, the courts that have tried to elaborate on *Thurston* have only been able to erect additional evidentiary hurdles that bear no relationship to the statutory language. Such enhanced standards will indeed reduce the number of cases in which double damages are awarded. But in so doing they will subvert, rather than enforce, the language of the statute and the will of Congress.

The Third Circuit has taken perhaps the most aggressive position in limiting awards of liquidated damages, requiring the plaintiff in an individual discrimination case to establish that an employer's conduct was in some respect "outrageous" before it can meet the statutory requirement of "willfulness." *Dreyer*, 801 F.2d at 657-

658.[10] The court based its requirement on this Court's acknowledgment in *Thurston*, 469 U.S. at 125, that Congress intended double damages under the ADEA to be "punitive in nature," and a statement in the Restatement (Second) of Torts that punitive damages may properly be awarded for conduct that is "outrageous." 801 F.2d at 657 (quoting Restatement (Second) of Torts § 908(2) (1982)).

There is no question that Congress intended ADEA double damages to be "punitive" in the sense that they would be awarded in cases where an employer met (or rather failed) a higher standard of culpability than that required for simple liability.[11] Congress also, however, provided its own definition of that higher standard on the face of the statute: the "punitive" sanction is justified in cases where the defendant's actions were "willful."[12]

[10] The Fifth Circuit appears to have imported a similar requirement of "egregious" conduct into its willfulness analysis. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1470 (5th Cir. 1989).

[11] In some ways, ADEA liquidated damages are significantly different from traditional punitive damages. They supplement a basic ADEA award that provides only for recovery of lost wages and benefits, which often does not fully compensate victims of discrimination for their losses. Cf. *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951) (backpay remedy under NLRA does not compensate victims for collateral losses). They are thus much less of a "windfall" to plaintiffs than in cases where ordinary damages are calculated to provide full compensation for actual injuries. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). ADEA liquidated damages are also, of course, statutorily limited to double the plaintiff's back wages; traditional punitive damages are not limited in this way.

[12] The *Dreyer* court thought that an enhanced standard was necessary "in order that the liquidated damages be based on evidence that does not merely duplicate that needed for the compensatory damages." 801 F.2d at 658. But the award of double damages is not a finding of a separate substantive ground of liability; it is a characterization of the blameworthiness of the actions that gave rise to the original finding. In cases where the underlying

The term "willful" has its own meaning, elaborated in *Thurston* and discussed above; to supplement that meaning with an additional requirement of "outrageous" conduct is to substitute a court's notion of the proper standard for enhanced liability for that specified by Congress.[13]

Similarly, the Sixth and Tenth Circuits have limited the award of double damages in individual cases to plaintiffs who can show that age was not only a determining factor in the questioned employment decision—the ground for predicate liability—but "the *predominant* factor" in that decision. *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d at 1551; see *Schrand* v. *Federal Pac. Elec. Co.*, 851 F.2d at 158 (following *Cooper*). Both courts based their excursion beyond the statutory language on the familiar but erroneous ground that *Thurston* required "two tiers" of liability in every type of ADEA case (and the companion error that simple application of the statutory standard, as explicated in *Thurston*, would result in double damages in every individual discrimination case). 836 F.2d at 1549-1551; 851 F.2d at 157-158.

In struggling to limit the award of double damages in ways not required by the statute (or by *Thurston*), the

conduct can properly be characterized as "willful," that fact will often appear from the same evidence used to establish that conduct in the first place. But see note 16, *infra* (liability evidence will not always suffice to demonstrate willfulness).

[13] The "outrageousness" standard has been criticized by other courts of appeals. See Pet. App. A20 (opinion below) ("This seems to us to fly in the face of *Thurston*, and we find the term 'outrageous' simply too amorphous to be of assistance in determining what constitutes a willful violation"); *Brown* v. *Stites Concrete, Inc.*, Nos. 91-2581, 91-3057 & 91-3139 (8th Cir. July 15, 1992), slip op. 7-9 & n.6 ("[n]othing in the ADEA or *Thurston* requires that a jury find a defendant culpable of outrageous conduct to award liquidated damages"); *Brown* v. *M & M/Mars*, 883 F.2d 505, 513 (7th Cir. 1989) (requirement of outrageousness "does not flow naturally from the ADEA's adoption of willfulness as the necessary predicate to liquidated damages"); *Cooper*, 836 F.2d at 1551.

courts have perforce developed a test that is arbitrary from the standpoint of the statutory text. The "predominant factor" test is not necessarily an irrational limitation; it simply bears no relation to the limitation selected by Congress. To be liable under the ADEA at all, an employer must have acted in a way that it would not have acted but for the plaintiff's age. The fact that other factors—legitimate, arbitrary, or perfidious, but unrelated to age—may have contributed to the employer's actions has no logical bearing on the secondary statutory inquiry of whether the employer acted with knowledge of or a reckless disregard for the illegality of its conduct to *whatever* extent it *was* based on age. If it did, it acted "willfully" within the meaning of the statute.

Finally, the Fourth and Eighth Circuits have tied the availability of liquidated damages under the ADEA to the strength or nature of the underlying proof of discrimination.[14] *E.g.*, *Gilliam* v. *Armtex, Inc.*, 820 F.2d 1387, 1390-1391 (4th Cir. 1987) (upholding liability but finding case "too thin to support the finding of a willful violation"); *Brown* v. *Stites Concrete*, slip op. 7-9 & n.7 ("district courts should * * * instruct juries that a plaintiff must present *direct* evidence of the employer's willfulness * * * [such as] statements or actions of an employer indicating a bias or animus against older workers") (emphasis added).[15] But the *strength* and *type* of

[14] Petitioners include the Seventh Circuit in this category (Pet. 11-12), citing *Aungst* v. *Westinghouse Elec. Corp.*, 937 F.2d 1216, 1223-1224 (7th Cir. 1991). But *Aungst* applied the *Thurston* standard, without more. Its reference to a finding of willfulness requiring "evidence beyond that which would prove an ordinary claim" refers "specifically" to the plaintiff's burden of proving "the intent and knowledge of the employer"—which of course is perfectly consistent with *Thurston*. The Seventh Circuit clearly applies the *Thurston* standard *tout court*. *Brown* v. *M & M/Mars*, 883 F.2d at 512-514.

[15] See also *Neufeld* v. *Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989) (two-tier standard meaningful where "willful-

evidence used to prove a violation should not be confused with the substance of the violation proved, including the employer's state of mind.

In relatively weak cases, where the evidence is thin, or pretext cases, where the plaintiff prevails by showing that the defendant's explanation for an employment action is unworthy of belief, triers of fact may as a practical matter be less convinced that discrimination actually took place than in cases where there is direct evidence of discriminatory motivation. Such doubts are to be resolved, however, either by the trier or by a reviewing court, in the finding of ADEA liability *vel non*. The plaintiff must convince the trier of fact, by whatever method and with whatever quantum of proof (sufficient to sustain the verdict), that the employer intentionally discriminated on the basis of age. That predicate fact established, however, it must logically be taken as true, without any requirement of further proof, for purposes of the determination of willfulness.[16]

---

ness" predicated on "direct evidence—more than just an inference from, say, an arguably pretextual justification—of age-based animus"); *Hansard* v. *Pepsi-Cola*, 865 F.2d at 1470 (denying liquidated damages because the "evidence in this case was weak"). Compare *Smith* v. *Great American Restaurants, Inc.*, Nos. 91-1793 & 91-1864 (7th Cir. July 24, 1992), slip op. 7 ("there is no requirement of direct evidence of willfulness (a requirement that would doom most plaintiffs' cases, since few employers leave a convenient record of their illegal intent)").

[16] To prove willfulness the plaintiff must, of course, show an additional element—the employer's knowledge of or reckless disregard for the law. As explained above (see page 15, *supra*), that is not an empty requirement, even in individual discrimination cases. But any argument that to prove willfulness the plaintiff must adduce additional or more persuasive evidence that the employer acted intentionally and impermissibly on the basis of the plaintiff's age reduces the initial verdict on discrimination to an unacceptable finding that the employer was only "a little bit liable." Cf. *Gilliam*, 820 F.2d at 1390 (upholding liability but reversing willfulness finding, for that purpose evidently accepting the employer's business justification defense as plausible and sympathetic).

None of the "enhanced" standards devised by these courts of appeals in an effort to limit willfulness liability in individual discrimination cases comports with the statute, with logic, or with this Court's decision in *Thurston*. Nothing in *Thurston* suggests that the standard of "willfulness" that it announced, which is rooted in the language and legislative purpose of the statute, should not be applied to all ADEA cases; the structure of the statute, which draws no distinctions among different types of cases, implies that it should. The First Circuit's adoption of the *Thurston* standard, "without modification or qualification," Pet. App. A20, in individual discrimination cases such as this one should therefore be affirmed.

II. THIS COURT SHOULD NOT ADOPT A PER SE RULE ON WHETHER INTERFERENCE WITH PENSION RIGHTS IS EVIDENCE OF AGE DISCRIMINATION

A. The Question of Pension Interference as Posed by Petitioners Is Not Presented by This Case

Petitioners present a second question in this case: whether an employer's interference with the vesting of an employee's pension rights, in a plan where benefits vest after ten years of service and are not otherwise based on age, violates the ADEA. Pet. i. Neither the record nor the court of appeals' opinion indicates, however, that the outcome in this case was at any stage based, as petitioners suggest (Pet. 14), on the creation of "a *per se* rule equating pension status with age." Respondent in fact disavows any such argument.[17] Resp. Br. in Opp.

---

[17] Respondent appears to have argued not that interference with pension vesting should be equated with age discrimination, but that petitioners treated him in a way they would not or could not have treated a younger man: they tried to force him to sign a burdensome agreement, without resolution of his compensation claims, thinking that he would have to accept because "[t]hey

9 n.5, 14-15. The district court explicitly recognized that "the discharge of an employee in order to eliminate the employee's pension rights cannot, by itself, establish age discrimination," Pet. App. A55, and both the district court and the court of appeals recited a variety of different pieces of evidence in their opinions sustaining the jury's finding of liability.

In order to reflect the facts of this case, petitioners' second question must therefore be rephrased as whether evidence of interference with pension vesting may be used as some support for a finding of age discrimination. Given the limited role of pension evidence in the presentation of this case to the jury and the review of the verdict by the district court,[18] however, we question whether this case presents even the reformulated question in the context most appropriate for consideration by this Court.

B. Interference With Pension Vesting May Be Evidence of Age Discrimination in Some Cases, Although the Opinion Below Relied Too Heavily on Such Evidence in This Case

Nevertheless, the court of appeals opinion, while not entirely clear on the relative weight given to the various items of evidence marshalled in support of the jury's ADEA verdict, does suggest that the court may have

---

had that pension hanging over him." C.A. App. 1054. See also Resp. Br. in Opp. 14 ("to the extent pension [vesting] was significant in this case, it was significant *because* of Biggins' age").

[18] Nothing in the judge's instructions could have led the jury to believe that it should find an ADEA violation if it concluded that respondent was fired solely to prevent his pension rights from vesting. The court instructed the jury that for respondent to prevail on his ADEA claim "*age* must have been the determining factor" (C.A. App. 1086 (emphasis added)), and referred to pension vesting only in the instructions pertaining to ERISA. The district court's decision upholding the ADEA verdict expressly rejected (Pet. App. A55) the notion that pension interference by itself could establish age discrimination.

viewed the pension evidence as important. Although the court reviewed the two age-related comments urged by respondent as direct evidence of age-based animus, see page 3, *supra*, it stated (Pet. App. A13) that "[t]he most significant evidence on the ADEA claim comes from the facts and circumstances surrounding the termination of Biggins' employment." The court then briefly rehearsed the evidence involving the proffered confidentiality agreement, Biggins' salary demands, the terms accorded to Biggins' younger replacement, the timing of the termination with respect to the vesting of Biggins' pension, and the discussion of a potential consulting arrangement. In its concluding summary (Pet. App. A14), however, the court seemed to focus on the pension evidence:

> Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years.
>
> Based on our review of the evidence, we find that it was within the province of the jury to decide whether age was a determining factor in the defendants' decision to terminate Biggins' employment.

As petitioners point out, Pet. 14-15, in this case evidence of interference with the vesting of respondent's pension could provide only weak support for a finding of age discrimination. Where, as here, the only criterion for vesting under a pension plan is a reasonably short period of service, and an employee's age is not a factor, there is little ground for inferring that an employer's intention to prevent an employee's pension from vesting is related to age, rather than to some other cause (or,

for that matter, simple bad blood).[19] Similarly, respondent's apparent theory (see note 17, *supra*) that the choices offered him by petitioners, including the choice to resign and forfeit his pension rights, were particularly burdensome because of his age is, even if true, at best weak evidence of the motivation for petitioners' actions.

Thus, we agree with petitioners that the courts below should have given little weight to the pension evidence in this case—at least without carefully articulating a clear theory on which that evidence was relevant to respondent's ADEA claim. On the facts of the case, however, we doubt that either court below found the pension evidence determinative. Although not strong, the remaining evidence included both direct evidence of age-based animus—the comments concerning respondent's age—and considerable circumstantial evidence, revolving around respondent's compensation claims and petitioners' arguably differential treatment of younger employees, of a sort well suited to credibility judgments by the trier of fact and review by the district court.[20] The jury's verdict can therefore be sustained without reliance on the evidence of interference with respondent's pension rights. This Court may nonetheless wish to make clear the limited utility of such evidence in cases of this sort and remand the case

---

[19] Interference with pension vesting of course violates ERISA, and indeed ERISA liability was imposed on petitioners in this case. 29 U.S.C. 1140; see Pet. App. A23-A24. In addition, a longer service requirement would present a more difficult age discrimination question. Interference with the vesting of pension rights requiring 30 years of service, for example, could realistically affect only older employees, and imminence of vesting under such a plan would correlate highly and suspiciously with age. See *White* v. *Westinghouse Elec. Co.*, 862 F.2d 56, 62 (3d Cir. 1988). A policy requiring employees to retire after 40 years of service would similarly be highly suspect under the ADEA.

[20] See *Matheuson* v. *National Automatic Tool Co.*, 807 F.2d 87 (7th Cir. 1986).

to the court of appeals for further consideration in light of this Court's guidance.

Although the proffered pension evidence was of little relevance to the age discrimination claim in this case, we note that discrimination cases present a particularly wide variety of individual facts and circumstances. Several courts of appeals have held that in at least some such circumstances evidence of pension interference can be relevant evidence of age discrimination,[21] and we think it would be unwise to mandate any per se rule prohibiting consideration of such evidence. The same argument applies to the other sorts of "age-correlated" evidence cited by petitioners which are likewise inevitably highly dependent for their relevance (or lack thereof) on the specific facts of individual cases.[22] While it may be appropriate to caution lower courts to scrutinize the alleged relevance of all such evidence with particular care, we believe the weight to be accorded it should ultimately be left to the sound discretion of courts confronted with specific cases in which the relevant issues actually arise.

---

[21] See, *e.g.*, *Visser* v. *Packer Eng'g Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); *Hansard* v. *Pepsi-Cola*, 865 F.2d at 1466 (evidence that employee was terminated seven months prior to vesting of pension benefits supported jury verdict on age claim); *White* v. *Westinghouse*, 862 F.2d at 62 (acknowledging case-by-case approach and holding additional retirement pension, earned by 30 years of service, closely related to seniority and to age).

[22] Compare *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202, 1208 (7th Cir. 1987) (use of high pay as proxy for age may be employed only on case-by-case basis where facts support its use) with *Holt* v. *Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986) (high salary not correlated with age where "primarily the result of promotions, merit raises based on [employee's] excellent evaluations, and * * * occupying a managerial position"). The varying results reached in such cases reflect the courts' sensitivity to variant fact patterns, not any conflict on matters of basic legal principle.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

EDWARD C. DUMONT
Assistant to the Solicitor General

DONALD R. LIVINGSTON
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
JENNIFER S. GOLDSTEIN
Attorneys
Equal Employment Opportunity Commission

AUGUST 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312324 45549